Supreme Court, U.S.
FILED
JUL 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Bert Taylor, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals in this case.

I.

QUESTION PRESENTED

1. Whether negligence is actionable under 42 U.S.C. § 1983.

II.

STATEMENT OF FACTS

Bert Taylor, Jr. ordered a hobby kit through the mail and paid for the order with two drafts drawn on his inmate account. The packages arrived at the penal complex about April 18, 1975, and were signed for by inmates assigned to the hobby center. Mr. Taylor was in the Adjustment Center at the time and not

permitted to have such hobby materials. Normal prison policy for the receipt of mail packages is that after packages arrived in the central mail room, they are either delivered to the prisoner who signs a receipt for the package or the prisoner is notified to pick up the package and sign a receipt for the package at that time. Prison policy required that Taylor sign for such a package as the receipt is the prison's record of having delivered the package to the prisoner. Deviations from these regulations have occurred under exceptional circumstances, but no such circumstances existed here. After leaving the Adjustment Center, Mr. Taylor contacted several prison officials in regard to the whereabouts of his packages but no one was able to find them. Mr. Taylor has never received the packages.

III.

REASONS FOR DENYING THE WRIT

A. Issues Improperly Raised

Only two of the issues set forth in the Petition for a Writ of Certiorari are properly before this Court. Only one of the Petitioners' QUESTIONS PRESENTED should be considered by the Court in deciding whether the Petition for Certiorari should be granted.

The Petitioners, in their QUESTIONS PRESENTED (Petitioners' Brief, page 2), set forth the following:

1. Whether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983.

2. Where a state prisoner claims to have suffered a tortious loss of property, whether the existence of a state tort claims remedy available to that prisoner provides him with such a level of due process as to satisfy the requirements of the Fourteenth Amendment.

3. Whether certain types of property are so *de minimis* as to not be protected by the Fourteenth Amendment under 42 U.S.C. § 1983.

4. Whether this record supports a finding of negligence on the part of either defendant.

The second question presented is raised for the first time by the Petitioners in this Court. The question of an adequate state remedy was not raised by Petitioners in either the trial court or the United States Court of Appeals for the Eighth Circuit. Consequently, the question should not be considered now. *California v. Taylor*, 353 U.S. 553, 557 n. 2 (1957); *Adrikes v. Kess & Co.*, 398 U.S. 144, 147 n. 2 (1969).

The third question of whether the property involved is *de minimis*, was raised for the first time in the United States Court of Appeals for the Eighth Circuit. It was not presented to the trial court and apparently not considered by the Court of Appeals.

To elaborate briefly on the second question (the appropriateness of the Petitioners raising the question of an adequate remedy under the Nebraska Tort Claims Act), it should be noted that this action was first filed by the Respondent some time before October 17, 1975, as Judge Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska, in his Order under date of March 24, 1976, noted:

> In an order dated October 17, 1975, I denied the plaintiff leave to proceed in forma pauperis, urging him to *seek relief first through the inmate grievance procedures. The plaintiff responded that he had done so and has been unsuccessful in obtaining the relief desire*. [sic] [Emphasis added].

Judge Urbom then ordered the pleading be filed and that the Attorney General file a responsive pleading within twenty days. *See* Appendix A *infra*. At no time did the Petitioners raise the question of whether the Nebraska Tort Claims Act provided adequate

due process protection until the filing of the Petition for Certiorari. Contrary to Petitioners' statement (Petitioners' Brief, page 15), Respondent was not represented by counsel throughout these proceedings. Counsel was not appointed for Respondent until April 19, 1977 (See Judge Schatz's order dated April 19, 1977, Appendix C), two days after the statute of limitations under the Tort Claims Act expired on Respondent's claim for one of his packages and only two days before the statute was to expire on the other (See Petitioners' Brief, Appendix E, page 20; Respondent's Appendix B). Given the usual two to three days for mail service, it is unlikely that Respondent or his attorney were aware that an order had been entered appointing counsel at the time the statute of limitations expired on both of his claims. It would be unfair to the trial court, the court of appeals, and most importantly, to the Respondent to consider this issue now.

Further, the third question (whether the property involved in this case, valued at $23.50, is *de minimis*) was raised for the first time in the court of appeals. The Court of Appeals for the Eighth Circuit apparently did not consider the question, as it was not properly before them. If one assumes the question was considered, the Court of Appeals obviously found the property involved was not *de minimis*. *Russell v. Bodner*, 489 F.2d 280 (3rd Cir. 1973); *Weddle v. Director, Patuxent Institution*, 436 F.2d 342 (4th Cir. 1970); *rev'd.* 405 U.S. 1036, 92 S.Ct. 1318, 31 L.Ed.2d 557.

Nebraska obviously felt the need to create an institution policy to protect the property of inmates, be it hobby material or other property. This policy was violated by the Petitioners, who are responsible for the enforcement of the policy. Disregard for the institution's pro edure resulted in Respondent being deprived of his property. Inmates at state institutions have

the right to expect that the policies of the institution will be followed. It is likely that in almost every instance the monetary value of inmate property coming in through the mail will be *"de minimis"* in a relative sense. Judged, however, against the inmates' standard of living, $23.50 is hardly *de minimis*. It is only through the safeguards provided by § 1983 that inmate property moving through the mail will be adequately protected.

B. Negligence As Cause of Action

The only issues properly before the Court in the Petition for Certiorari are the questions of whether negligence is actionable under 42 U.S.C. § 1983, and whether the record supports a finding of negligence. The latter question certainly is not of such significance that it deserves the consideration of the Court. *Berenyi v. Immigration Service*, 385 U.S. 630 (1967); *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271 (1949). As to the question of negligence, a split of authority does appear to exist. See, e.g., *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976); *McCray v. State of Maryland*, 456 F.2d 1 (4th Cir. 1972); *Santiago v. City of Philadelphia*, 435 F.Supp. 136 (E.D. Pa. 1977). The issue is seemingly an important one.

Respondent believes that (1) negligence is actionable under § 1983; (2) the circuits themselves seem to be in a state of flux as to how the issue ought to be resolved; and (3) the record in this case is inadequate for this Court to resolve the question of whether negligence is actionable under § 1983. Respondent asserts that an allegation of negligence should be sufficient to constitute a cause of action under 42 U.S.C. § 1983. In the case of *Monroe v. Pape*, 365 U.S. 167 (1961), this Court stated:

> The word "willfully" does not appear in § 1979 [1983]
>
> * * *
>
> Section 1979 [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

365 U.S. 167, 187 (1961).

This language suggests that negligent conduct, which causes the deprivation of a federal right can justify liability under § 1983. Additionally, § 1983 does not contain language which implies that any greater degree of culpability is required.

The District Court of the Eastern District of Pennsylvania stated in the case of *Santiago v. City of Philadelphia*, 435 F.Supp. 136 (E.D. Pa. 1977):

> Rather, § 1983 states that any person who "subjects, or causes to be subjected" another to a deprivation of a right "shall be liable." 42 U.S.C. § 1983. It does not state the defendant must willfully or intentionally cause that deprivation.

435 F.Supp. at 136.

Clearly, there are two essential elements which must be established by a plaintiff proceeding under § 1983. First, that the plaintiff has been deprived of a federally protected right. Second, that the injury was the result of state involvement which falls within the "under color" language of § 1983.

The Respondent has been deprived of his property, the hobby materials, without due process of law in this case. This right is a well-defined and fundamental right. Further, the deprivation of property took place as a result of the actions or inaction of the Petitioners acting under color of state law. Thus, the two-pronged requirement for imposing § 1983 liability has been satisfied by the Respondent. This judgment should stand.

Aside from this, the circuits themselves seem to be in a state of flux as to whether negligence constitutes a cause of action under § 1983. Although Respondent does not necessarily concur with Petitioners' analysis, Petitioners assert in their brief (page 6) that the Fifth Circuit Court of Appeals recently reversed itself. Petitioners also assert that the Court of Appeals in this case has adopted a standard different from other cases previously decided (Petitioners' Brief, page 8), by the Court of Appeals for the Eighth Circuit and different from

decisions by district courts within the Eighth Circuit. This seems to indicate that many of the circuits have yet to finally resolve the question of whether negligence does constitute a cause of action under § 1983. It seems appropriate for this Court to allow the question of negligence as a cause of action under 42 U.S.C. § 1983 to be presented and decided under additional sets of circumstances and to allow for the evolution of other rationale before attempting to resolve the question.

C. Inadequacy of Record

Finally, this case was tried upon a stipulated set of facts at the suggestion of the attorney for the Petitioners after Petitioners had repeatedly failed to respond to discovery by Respondent. (*See* Appendix D, Order of Judge Schatz dated September 19, 1977). The stipulation was agreed to, at least in part, because of representations by the attorney for Petitioners that he had checked with everyone at the penal complex involved, and still available, and no one had any idea as to what had happened to the packages. The record does not reflect whether the packages were lost, stolen, misdelivered, thrown away or the victim of a practical joke. The record does reflect that the institution's regulations, as they relate to mail, were not followed in that a fellow inmate of Respondent and one other person were allowed to receipt for Respondent's packages and that no justification existed for noncompliance with proper procedure. Many of the cases that have attempted to resolve the negligence issue under § 1983 have discussed the need, or lack of need, for culpable behavior. *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976); *Leite v. City of Providence*, 463 F.Supp. 585 (D.R.I. 1978). The record in the present case does not reveal how the conduct might be characterized. The issue of whether

negligence is actionable under § 1983 is of significance and it is respectfully suggested that in order to properly consider the issue, the Court needs a more comprehensive record than is presently before it.

CONCLUSION

The judgment in this case has not made the Petitioners either an "insurer" or "guarantor" of the property of inmates. The Respondent asked permission from prison authorities to order the hobby gifts and permission was granted. He then asked that money be withdrawn from his account to pay for the materials and this was done. The policy that Petitioners did not follow in this case was obviously developed to protect inmates' property from exactly what happened here. No reason existed for their failure to comply with the regulation. Petitioners should be required to see that prison regulations are adhered to and to accept responsibility when they fail to do so; this does not make them insurers.

Respondent respectfully requests that for all of the foregoing reasons, the Petition for Certiorari be denied.

Respectfully submitted,

KEVIN COLLERAN
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Lincoln, Nebraska 68508
Telephone: 402/474-6900

Counsel for Respondent

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
DISTRICT OF NEBRASKA
AT _____
MAR 24 1976 - /
William L. Olson, Clerk
By _____ Deputy

BERT TAYLOR, JR.,

Plaintiff,

vs.

MR. ROBERT PARRATT, individually and in his official capacity as Warden of the Nebraska Penal Complex; MR. FRANCIS LUGENBILL, individually and in his official capacity as Hobby Manager of the Nebraska Penal and Correctional Complex,

Defendants.

MEMORANDUM AND ORDER

JUDGE SCHATZ

CV76-L-57

Bert Taylor, Jr., an inmate at the Nebraska Penal and Correctional Complex, has submitted a petition for relief under the Civil Rights Act, 42 U.S.C. § 1983, accompanied by a request to proceed in forma pauperis. The plaintiff contends that various hobby materials ordered by him from a California company were received by prison officials but were not turned over to him.

This is not the first time that the plaintiff has brought this issue before the court. 'In an order dated October 17, 1975, I denied the plaintiff leave to proceed in forma pauperis, urging him to seek relief first through the inmate grievance procedures. The plaintiff responded that he had done so and had been unsuccessful in obtaining the relief desire.' I thus proceeded to the merits of the plaintiff's claim and in my order of November 4, 1975, ruled that the plaintiff's claims were legally frivolous under 28 U.S.C. § 1915(d). The plaintiff then filed a notice of appeal, which I construed as a motion for leave to proceed on appeal in forma pauperis. I denied this motion on December 12, 1975, ruling that the issue in the case was legally frivolous.

The plaintiff now raises this same issue again. Accordingly, I must construe this petition as a motion for relief from judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure for "mistake, inadvertence, surprise, or neglect." The plaintiff alleges facts beyond those pleaded in his previously dismissed complaints. He states that this was not simply a matter of not being able to order the goods he desired, but rather is a case where after he had made payment for the goods out of his inmate account at the Penal Complex, the goods were received by the prison but were never turned over to him, and that since that time he has received neither the goods nor a return of his money. It would appear that a cause of action for deprivation of property without due process of law under the Fourteenth Amendment has been stated.

The plaintiff's failure to plead such facts in his original pro se petition can be characterized as mistake, inadvertence, or excusable neglect under Rule 60(b)(1).

IT HEREBY IS ORDERED:

1. That the petition will be construed as a motion for relief from judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure and the motion is granted;

2. That the petition be filed by the clerk without the prepayment of costs and that the clerk issue a summons in the usual form and mail it and a copy of the complaint to the Attorney General of the State of Nebraska; and

3. That the defendants shall file a responsive pleading within twenty days of the receipt of the summons and complaint by the Attorney General of Nebraska.

Dated March 23, 1976.

BY THE COURT

Chief Judge

APPENDIX B

Respondent's Original Complaint filed March 26, 1976, paragraph 10

10. Plaintiff contacted Mr Rybolt again and was advised that the name of the party who signed for the Pack- of Apnl 17, 1975, was that of Chuck Kosta. Paul Garo signed for the package of April 21, 1975. Garo was an inmate in the Penal Complex. The action of these two parties in signing for said packages was strictly in violation of the rules of the Institution.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

BERT TAYLOR, JR.,

Plaintiff,

v.

MR. ROBERT PARRATT, Individually and in his Official Capacity as Warden of the Nebraska Penal and Correctional Complex, et al.,

Defendants.

CIV. 76-L-57

ORDER

FILED
DISTRICT OF NEBRASKA
AT _____ M
APR 19 1977 3:32
William L. Olson, Clerk
By _____ Deputy

This matter comes on for determination with reference to motion of plaintiff, Bert Taylor, Jr., for appointment of counsel (Filing Nos. 24 and 25) and for default judgment (Filing No. 30) and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff's motion for appointment of counsel should be and the same is hereby granted, and that Kevin Colleran, 1900 First National Bank Building, Lincoln, Nebraska, 68508, is hereby appointed as counsel for plaintiff in this cause.

IT IS FURTHER ORDERED that plaintiff's motion for default judgment be and the same is hereby overruled without prejudice.

BY THE COURT:

Albert G. Ashby

JUDGE, UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

BERT TAYLOR, JR.,
Plaintiff,
v.
ROBERT PARRATT, et al.,
Defendants.

CIV. 76-L-57

ORDER

FILED
DISTRICT OF NEBRASKA
AT
SEP 19 1977. 39
William L. Orton, Clerk

This matter coming on for determination with reference to plaintiff's motion for default judgment (Filing No. 34) and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that said motion is hereby at this stage overruled without prejudice;

IT IS FURTHER ORDERED that, based upon the representations and suggestion of counsel for defendants, that the parties will attempt to present this matter to the Court on a written stipulation of facts and to that end, the said defendants will prepare and forward to counsel for the plaintiff a proposed written stipulation within twenty (20) days from date hereof, and counsel will then report the status of the case immediately thereafter to the Court.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT